IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 40 of 1992

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA Sd/-
and
HON'BLE MS.JUSTICE H.N.DEVANI Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME TAX

Versus

LAXMI TALKIES,

Appearance:

1. INCOME TAX REFERENCE No. 40 of 1992
MRS MONA M.BHATT FOR MR MANISH R BHATT for Appellant.
SERVED BY RPAD - (N) for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 15/12/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1 The Income Tax Appellate Tribunal , Ahmedabad Bench 'C' Ahmedabad has referred the following question under Section 256(2) of the Income Tax Act,1961 (the Act) at the instance of the Commissioner of Income Tax,

Gujarat-III, Ahmedabad.

"Whether on the facts, circumstances and legal positions, the assessee is entitled to allowance of an amount of Rs.2,49,508/- on account of renovation of the theatre, stamp duty, interest payment etc. as an admissible deduction as revenue expenditure ?"

2 The assessment year is 1976-77 and the relevant accounting period is S.Y.2031. The assessee, a registered firm carried on business of exhibiting cinema films. During the accounting period an expenditure to the tune of Rs.2,17,285/- was claimed under the head theatre renovation and repairing expenses. The assessee also claimed expenditure on account of stamp duty interest etc. amounting to Rs.32,221/-. The Assessing Officer held that the aforesaid expenditure did not amount to revenue expenditure and was capital in nature as it brought into existence an advantage of enduring nature.

3 The assessee carried the matter in appeal before the Commissioner (Appeals) who vide his order dated 20/4/1981 allowed the claim of the assessee following the decision of Supreme Court in case of Empire Jute Co. Ltd.vs. Commissioner of Income Tax,(1980) 124 ITR 1 and in case of India Cement Co. Ltd., 60 ITR 52.

4 The revenue challenged the said order before the Tribunal who upheld the order made by CIT (Appeals) vide its order dated 4/8/1984. The Tribunal after referring to various decisions of the Apex Court and High Courts culled out the following broad principles :

"Firstly, the expenditure which is incurred in course of process of profit earning is revenue in character.

Secondly, the expenditure on renovating, refurnishing and remoderning a business premises can be allowed as a deduction on revenue account when a tenant incurs such an expenditure on a rented premises in as much as it does not acquire any capital asset thereby, more so when the building does not belong to him.

Thirdly, when the expenditure is incurred for running of the business and does not involve any extension of business or substantial replacement of existing business asset such an expenditure

would be revenue expenditure.

Fourthly, the expenditure on restoration of stage, screen to put the same in the condition in which they were before the repairs were undertaken could be legitimately be held to have been incurred on repairs and did not bring into existence any asset or enduring benefit.

Fifthly, when the assessee is not an owner of the premises and there was no long lease in favour of the assessee such an assessee does not obtain an enduring benefit as a result of expenditure incurred on partition walls show-windows etc.

Sixthly, expenditure incurred on repairs for proper up-keep of a picture house is said to have been incurred on ground of commercial expediency and in course of ordinary commercial trading activity of the assessee such an expenditure was allowable as a business expenditure.

Lastly, the test of enduring benefit is not necessarily a conclusive test to be applied blindly and machanically without regard to particular facts and circumstances of a given case and that whether the expenditure is on capital account or revenue account would depend upon the practical and business point of view rather than juristic classification of legal rights. The question must be viewed in the larger context of business necessity or expediency."

5 Applying the said principles to the facts of the case the Tribunal came to the conclusion that the stand of the revenue that the expenditure was capital in nature could not be accepted and the order of CIT (Appeals) was upheld.

6 Mrs.Mona M.Bhatt,learned Standing Counsel appearing on behalf of the applicant revenue submitted that the premises in which the assessee carried on business belong to HUF of one Shri Vinubhai Panchal and as per the terms of the lease deed, entered into between the parties, repairs, if any, to the premises were to be carried out by the lessor HUF. That the assessee was under no obligation to carry out any such repairs or renovation and in the circumstances it could not be permitted to contend that the expenditure incurred by the assessee was allowable expenditure incurred for the

purpose of business. Secondly, it was urged that even if the expenditure was considered to be incurred for the purpose of business it resulted into an enduring benefit to the assessee and hence was on capital account and was required to be disallowed. That the Tribunal having failed to do so the impugned order of the Tribunal was bad in law taking into consideration the facts and circumstances of the case. In support of the submission she placed reliance on decision of Commissioner of Income Tax Vs. Shri Digvijay Cement Company Ltd.,(1986) 159 ITR 253.

7 Though served there is no appearance on behalf of the respondent assessee.

8 In case of Commissioner of Income Tax Vs. Mehta Transport Co.,(1986)160 ITR 35, this Court was called upon to decide as to whether the expenditure incurred by the assessee before it on construction of a loft in rented premises was revenue in nature or not. The assessee therein had taken shop premises consisting of ground floor admeasuring 450 sq.ft. on lease and in the said premises it constructed a loft admeasuring about 350 sq.ft. The Court after referring to various decisions summarised the enunciated law in the following terms :

"What is the money wholly and exclusively laid out for the purposes of business is a question which must be determined upon the principles of ordinary commercial trading. In the ultimate analysis, the moot question is as to whether it is the expenditure laid out as a part of the process of profit earning (see Tata Hydro-Electric Agencies Ltd. v. CIT[1957] 5 ITR 202(PC)). If the expenses are entailed for initiation of business, or for extension of business, or for substantial replacement of equipment, they would be capital in nature. However, in the case of a running business, where they are not entailed for extension of business, or for substantial replacement of equipment, they may be treated as properly attributable to capital when they are made not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade/business. If they are not entailed for extension of business or for advantage of the enduring benefit to the business, but made for the purposes of running the business or working it with a view to produce profits, they would be chargeable to revenue account. The aim and

> object of the expenditure would determine the character of the expenses. It is only in those cases where these tests also fail that the court may consider as to whether the expenditure incurred was a part of the fixed capital of the business, or part of its circulating business (see Assam Bengal Cement Co.Ltd. vs. CIT [1955] 27 ITR 34 (SC)). The words used for qualifying the advantage "as being of permanent or enduring nature" are not to be understood in the sense that the advantage which would be obtained would last for ever. In certain circumstances, this test of bringing into existence an advantage of enduring nature may not serve the purpose. There may be cases where expenses, even if resulting in the advantage of an enduring benefit, may be properly chargeable to revenue account if the advantage consists merely in facilitating the assessee's trading operations, or enabling him to manage and conduct his business more efficiently or more profitably while leaving the fixed capital untouched (see Empire Jute Co. Ltd. v. CIT[1980]124 ITR 1(SC)). If the outgoing or expenditure is so related to the carrying on or conduct of the business that it may be regarded as an integral part of the profit earning process, and not for acquisition of an asset, or a right of a permanent character, the possession of which is a condition of carrying on of the business, the expenditure may by regarded as revenue expenditure (see Bombay Steam Navigation CO.(1953) P.Ltd. v. CIT[1965]56 ITR 52 (SC)). One of the relevant questions which the court has to ask is that : is the disbursement made for acquisiton of a source of profit or income, or is it for facilitating the trading operation, or carrying it on in a more efficient manner ?(see Empire Jute Co.Ltd.'s case [1980] 124 ITR 1(SC))."

Applying the aforesaid tests to the facts of the case before it this Court held that the expenditure incurred was for the purpose of facilitating carrying on of the business with greater efficiency by improving the working conditions.

9 The Tribunal has found on facts that the assessee in the present case did not derive any enduring benefit as the assessee was operating as a lessee in leased premises. However, even if it could be termed to be an advantage of enduring nature it is not in every case that

such advantage would result in the character of the expenditure being treated as capital. As laid down by the Apex Court in case of Empire Jute Co.Ltd. (supra) :

" xxx xxx There may be cases where expenditure, even if incurred for obtaining advantage of enduring benefit, may, none the less, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by an assessee that brings the case within the principle laid down in this test. What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The test of enduring benefit is, therefore, not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case."

11 The Tribunal has found on facts that :

"9. xxx xxx We have examined the details filed by the assessee and we are satisfied that the entire expenditure was towards repairs and renovation without bringing into existence any new asset or extension to the existing asset. The expenditure incurred show that the assessee had demolished the flooring stair case railings and had replaced by new tiles. Similarly the old wooden stair case has been removed and replaced by concrete stair case. The screen has been replaced and cement plastering has been done. All these expenditure is connected with the repairs of the existing accommodation and therefore our conclusion is that the impugned expenditure did not bring into existence any asset or advantage of enduring nature and therefore must be held to be on revenue account"

12 Thus applying the tests formulated by the Apex Court and this Court to the facts found by the Tribunal

it is apparent that the assessee had merely incurred expenditure in rented premises to facilitate its trading operations in a more efficient manner leaving the fixed capital untouched. The result of the expenditure incurred was that it would enable the assessee to generate more revenue by inviting greater flow of customers to the cinema hall without bringing into existence any new asset or an advantage of enduring nature considering the status of the assessee as a lessee. Thus there is no infirmity in the order of the Tribunal which would require this Court to interfere.

13 The question referred to the Court for its opinion is answered in the affirmative i.e. in favour of the assessee and against revenue. The reference stands disposed of accordingly. There shall be no order as to costs.

(D.A.Mehta, J)

(H.N.Devani, J)

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